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No. 80-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY MEMORANDUM OF CROSS-PETITIONER TRANSCONTINENTAL GAS PIPE LINE CORPORATION

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Because the court below inconsistently decided the two rate issues involved in this case, Transcontinental Gas Pipe Line Corporation (Transco) seeks review of the rate of return portion of the decision below if this Court reviews that aspect of the decision which decided the zone rate differentials issue raised in Petitions filed by the Federal Energy Regulatory Commission (Commission) in No. 80-1937, North Carolina Utilities Commission (NCUC) in No. 80-1938, and North Carolina Natural Gas Corporation, *et al.* (NCNG, *et al.*) in No. 80-1939. No party filing a brief in opposition to Transco's Cross-Petition claims that the decision below consistently decides the two rate issues. On the contrary, NCNG, *et al.*, expressly concedes the inconsistency, and NCUC implicitly concedes such inconsistency by not opposing

Transco's Cross-Petition. The Commission, while not directly addressing the foregoing claim of inconsistency, presents an argument which illustrates, rather than dispels, the inherent validity of Transco's claim of inconsistency.

1. To understand the arguments presented in opposition to Transco's Cross-Petition the nature of the inconsistency in the decision below merits reiteration. The decision below holds that Section 5(a) is applicable to *both* rate issues involved in this case, but it failed to apply Section 5(a)'s standards to the rate of return decision.[1] The Commission and other Petitioners challenge the holding that Section 5(a)'s requirements are applicable to the zone differentials issue but are silent on the holding that Section 5(a) is applicable to the rate of return issue, presumably because the result was favorable to these parties. Transco's complaint in its Cross-Petition is that, while giving lip service to the applicability of Section 5(a) to the rate of return decision, the court below did not in fact apply Section 5(a)'s standards to that issue. Thus, if this Court grants certiorari only as to the zone differential issue, there will remain an inconsistency between the two issues, either as to the basic issue of whether Section 5(a) governs or as to the manner in which it is applied. Only by taking both issues can the Court straighten out this inconsistency.

2. NCNG, *et al.*, while forthrightly recognizing the inconsistency in the decision below, urges this Court to

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[1] The court below held that when the Commission not only voids a proposed increase in return under Section 4 of the Natural Gas Act but also sets aside the pre-existing rate of return in favor of its own determination, it must proceed under Section 5(a) of the Act. FERC Pet. App. A, pp. 24a-25a, n.27. Thus, the reduction of Transco's pre-existing rate of return determination from 14.75 percent to 14.00 percent is governed by the standards of Section 5(a).

single out the zone differentials issue, presumably because these parties wish to preserve what they now perceive to be a favorable result on the issue of rate of return.[2] However, having recognized the inconsistency below, there is simply no logic to their position that only one of these issues should be resolved by this Court.

3. The Commission argues that, even if the court below was correct in determining Section 5(a) to be applicable to the rate of return issue, the court below correctly held that the Commission had statisfied the requirements of Section 5(a) and, therefore, the rate of return decision should not be reviewed. Besides the fact that the Commission claims that Section 5(a) does not apply to rate of return any more than to zone rate differentials and that the applicability of correct standards is the basis of the Commission's Petition in these cases, the Commission's argument lacks credibility. In the first place, the Commission never purported to decide the rate of return issue pursuant to Section 5(a) and adamantly insists that it would be erroneous to require that it do so. Secondly, the Commission's rate of return order itself (Cross-Pet. App. C, p. 12a) demonstrates conclusively that the Commission *ignored* Transco's pre-existing rate of return allowance in deciding the case; that the Commission would now argue that such cavalier disregard of a pre-existing rate component is the equivalent of the reasoned focus on an established lawful rate component required by Section 5(a) is totally unconvincing.[3] Moreover, it is apparent from the Commission's con-

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[2] These parties never took a position on the merits of the rate of return issue in any of the proceedings below.

[3] Proof positive that the Commission's argument is disingenuous is the fact that the rate of return *result* would have been quite different had the court below actually applied Section 5(a), where any change in the pre-existing rate of return would have been prospective from the date of the Commission's decision.

voluted argument opposing review of the rate of return issue that the court below improperly interjected itself in the administrative process by finding (1) that the Commission inadvertently complied with statutory standards which the Commission itself has consistently refused to recognize as applicable, and (2) by creating a rationale on behalf of the Commission that would support affirmance of the rate of return orders. However, since the Commission does *not* subscribe to the rationale of the court below on the rate of return issue (and indeed could not do so without undermining its argument that the zone rate differentials issue should be reviewed), the basis for its opposition to Transco's Cross-Petition is totally unavailing.

4. Unlike NCNG, *et al.*, NCUC did take a position on Transco's rate of return before the Commission and preserved the issue by appealing the rate of return decision to the court below. However, NCUC's position was rejected in the court of appeals and it failed to file a timely petition for certiorari or a cross-petition on that aspect of the decision below. Accordingly, NCUC cannot at this late date petition this Court for review of this adverse decision in the court below.[4]

CONCLUSION

For the foregoing reasons, Transco's Cross-Petition for review of the rate of return portion of the decision

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[4] The court below (FERC Pet. App. A, p. 21a) found "nothing in the record to warrant our disturbance of the Commission's judgment [in discussing NCUC's allegations]." This is not surprising, because NCUC failed to introduce any evidence in hearing to support its claims. This ruling by the court below, however, is not inconsistent with any portion of the court's decision on zone rate differentials, and NCUC should not be allowed to bootstrap review of an issue that it did not preserve simply because Transco has preserved its issue dealing with the same subject matter, *i.e.*, rate of return.

below should be granted, if the Petitions in Nos. 80-1937, 80-1938 and 80-1939 are granted.

Respectfully submitted,

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